

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE**

SIERRA CLUB and
DELAWARE AUDUBON,

Appellants,

v.

DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL OF
THE STATE OF DELAWARE,

Appellee,

and

DELAWARE CITY REFINING
COMPANY LLC,

Intervenor-Appellee.

Appeal No. 2013-06

DECISION AND FINAL ORDER

I. BACKGROUND

Following required public notice and in accordance with Subchapter III, Chapter 101 of Title 29 of the Delaware Code, a public hearing was conducted by the Environmental Appeals Board ("Board" or "EAB") on January 13, 2014 in the auditorium of the Richardson & Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware, concerning an appeal ("EAB Appeal" or "Appeal") filed by the Sierra Club and Delaware Audubon (collectively "Environmental Appellants") challenging the issuance of Secretary's Order No. 2013-A-0020 (the "Order") by the Delaware Department of Natural Resources and Environmental Control ("DNREC").

Members of the Board present and constituting a quorum at the January 13, 2014 public hearing were Chairperson Nancy J. Shevock, Gordon E. Wood, Sebastian LaRocca, Michael Horsey, Dean Holden, and Andrew Aerenson, Esquire. Deputy Attorney General Frank N. Broujos represented the Board.

The Environmental Appellants were represented by Kenneth T. Kristl, Esquire of the Widener Environmental and Natural Resources Law Clinic. Appellee DNREC was represented by Max B. Walton, Esquire and Matthew Boyer, Esquire of the law firm of Connolly Gallagher LLP. Intervenor-Appellee Delaware City Refining Company LLC ("DCRC") was represented by Joseph C. Schoell, Esquire of the law firm of Drinker Biddle & Reath LLP, as well as Katherine L. Vaccaro, Esquire and Bart E. Cassidy, Esquire of the (Pennsylvania) law firm of Manko, Gold, Katcher & Fox, LLP. Ms. Vaccaro and Mr. Cassidy were admitted *pro hac vice* in accordance with Delaware Supreme Court Rule 72.¹

II. THE NATURE OF THE EAB APPEAL

On June 14, 2013 Environmental Appellants, through counsel, filed separate (and timely) appeals to this Board and the Coastal Zone Industrial Control Board ("CZICB") ("EAB Appeal" and "CZICB Appeal" respectively) challenging the Order, under which the DNREC Secretary authorized the issuance of an amended air pollution control permit (the "Permit") to DCRC for modifications to DCRC's Marine Vapor Recovery System

¹ Subsequent to the filing of the EAB Appeal, DCRC, as the permittee that was granted the amended air pollution control permit authorized by the Secretary's Order and whose interests are directly affected by the Appeal, filed a motion to intervene in this matter. The motion was not opposed by the Environmental Appellants or by DNREC. Accordingly, the Chair entered an order on September 25, 2013 granting DCRC's motion to join this matter as an Intervenor-Appellee.

("MVRs") at its petroleum refinery and docking facility in Delaware City, New Castle County, Delaware. The grounds for both appeals are identical in virtually every respect and challenge the Order as to the applicability of the Coastal Zone Act (the "CZA")² to DCRC's proposed use under the Permit, such use being the transfer of crude oil to barges for shipment offsite. Both appeals contend that the MVRs, which is designed to control emissions during the barge loading process, is part of a "larger crude oil transfer operation" that is prohibited under the CZA and therefore the Permit should not be issued.³ The Environmental Appellants do not challenge any other aspect of the Order besides the applicability of the CZA and the resulting conclusion that no CZA permit is required for the "crude oil transfer operation."⁴

The Environmental Appellants' dual filing with this Board and the CZICB was due to their admitted uncertainty as to which of the two boards has subject matter jurisdiction and the "question[s] that could be raised as to whether the CZICB has jurisdiction to hear the appeal. To avoid the situation where they file before the CZICB only and then find out too late that the CZICB does not believe it has jurisdiction, the [Environmental] Appellants [] simultaneously [filed their] appeal as a prophylactic measure to assure that the CZA issues are decided on their merits. . . ."⁵

² 7 Del.C. § 7001 *et seq.*

³ "The MVRs uses a vapor collection system, a gas enhancement system, and two vapor chambers to reduce air emissions from hazardous air pollutants. The petroleum vapors that would otherwise be released during the loading of vessels are collected by MVRs and burned in the two combustion units." Order at 1-2.

⁴ "The Appellants are challenging only the portion of the Order in which the Secretary ruled on the status of the crude oil transfer operation under the Coastal Zone Act, 7 Del.C. § 7001 *et seq.* (CZA)." Environmental Appellants' Statement of Appeal at 1.

⁵ Environmental Appellants' Statement of Appeal at 1.

The specific relief sought by the EAB Appeal is that “the Order should be reversed or remanded with instructions to DNREC to comply with the Coastal Zone Act and its implementing regulations.”⁶

III. THE STATUS OF THE CZICB APPEAL

The Environmental Appellants’ CZICB Appeal was heard by the CZICB at a public hearing conducted on July 16, 2013. At the outset of the hearing the CZICB considered two potentially case-dispositive motions filed by DNREC and DCRC but neither was initially decided. After the close of the evidentiary portion of the hearing but before ruling on the merits, the CZICB voted unanimously to grant DNREC’s and DCRC’s motions to dismiss the appeal for lack of standing. However, due to an insufficient number of members voting in favor of DNREC’s and DCRC’s motions to dismiss for lack of subject matter jurisdiction, the CZICB did not grant those motions.

The CZICB’s written decision was issued August 13, 2013 and the Environmental Appellants subsequently appealed that decision to the Superior Court, challenging the CZICB’s granting of DNREC’s and DCRC’s motions to dismiss for lack of standing. Additionally, DCRC and DNREC each filed a cross-appeal of the CZICB’s decision, challenging the CZICB’s failure to grant their motions to dismiss for lack of subject matter jurisdiction. As of the date of this decision, those appeals are still pending in the Superior Court.⁷

⁶ Environmental Appellants’ Statement of Appeal at 7.

⁷ See Superior Court C.A. No. N13A-09-001, at Delaware State CourtConnect, http://courtconnect.courts.delaware.gov/public/ck_public_qry_main.cp_main_idx (last accessed April 4, 2014).

IV. PROCEDURAL BACKGROUND OF THE EAB APPEAL

By letter dated August 21, 2013 to all parties, the EAB Appeal was first scheduled for hearing on December 10, 2013. In October 2013 the parties, including DCRC as Intervenor-Appellee, entered into a stipulation regarding the filing by DCRC and DNREC of motions to dismiss on the grounds that the Board does not have authority to exercise subject matter jurisdiction over the EAB Appeal. The stipulation established a prehearing briefing schedule on the motions to dismiss, and memorialized the parties' understanding that the Board would not conduct an evidentiary hearing on the merits of the EAB Appeal at the December 10th hearing.⁸ The parties agreed that the Board would hear only oral arguments on the motions to dismiss and further agreed on future dates for a hearing on the merits in the event the motions were not granted.

In accordance with the parties' stipulation, DNREC filed its "Motion to Dismiss the Appeal for Lack of Subject Matter Jurisdiction" and Opening Brief in support of its motion on November 4, 2013; DCRC filed its "Motion to Dismiss for Lack of Jurisdiction" and Opening Brief in support of its motion on November 4, 2013; the Environmental Appellants filed their Answering Brief on November 20, 2013; and DCRC and DNREC filed their respective Reply Briefs on December 3, 2013. The motions and briefs were provided to Board members prior to the hearing.

⁸ The hearing scheduled for December 10, 2013 was cancelled due to inclement weather and subsequently rescheduled to January 13, 2014 following required public notice.

V. ENVIRONMENTAL APPELLANTS' REQUEST TO STAY APPEAL

A. Summary of Facts and Arguments

Although not specifically addressed by the parties' stipulation or presented to the Board by formal motion, the Environmental Appellants argue in their Answering Brief that the Board should stay the EAB Appeal, including consideration of the motions to dismiss for lack of subject matter jurisdiction, until the Superior Court decides whether the CZICB has subject matter jurisdiction to hear the CZICB Appeal. Both DNREC and DCRC argue in their respective Reply Briefs against a stay. In addition to the briefing, the Board heard oral argument on the stay request. The parties' arguments are briefly summarized below.

Environmental Appellants argue that the Board should rely on the "wisdom of the Superior Court" to address the "difficult questions" relating to the subject matter jurisdiction issue. Additionally, citing the balancing test set forth by the Delaware Superior Court in *Lanova Corp. v. Atlas Imperial Diesel Engine Co.*, 64 A.2d 419, 421 (Del.Super. 1949), the Environmental Appellants claim that they can easily meet their burden of demonstrating "hardship or inequity" to overcome "possible inconvenience" to DCRC and DNREC should a stay be granted. The Environmental Appellants contend that their "hardship or inequity" is the possibility that neither this Board nor the CZICB will have subject matter jurisdiction (in the event neither board accepts jurisdiction) thereby depriving the Environmental Appellants of a forum in which the Order can be reviewed. According to the Environmental Appellants, the only "possible inconvenience" to DCRC presented by a stay is the result of DCRC's decision to litigate

procedural issues such as standing and subject matter jurisdiction as opposed to the merits of the Appeal.

Citing *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281, 283 (Del. 1970), the Environmental Appellants argue that the Board's discretion is properly exercised by granting a stay because doing so under the circumstances avoids "the wasteful duplication of time, effort and expense" and ensures the expeditious and economic administration of justice by allowing the Superior Court to rule on the CZICB's subject matter jurisdiction and thereby avoiding the risk of conflicting rulings between this Board and the CZICB. Further, the Environmental Appellants contend that "the Superior Court will likely decide whether or not the CZICB has jurisdiction to hear Appellants' parallel appeal" and if the Superior Court finds in their favor on that issue and the CZICB decides the appeal on its merits, then this Board will not need to conduct its own hearing.

DNREC argues that a stay is improper because the Board must first determine "as a threshold issue" whether or not it has subject matter jurisdiction before deciding the issue of a stay. DNREC also argues that the Environmental Appellants are not at risk of suffering any "hardship or inequity" absent a stay because an adverse decision from this Board regarding subject matter jurisdiction may be appealed to the Superior Court.

DCRC argues that the Environmental Appellants' request for a stay is procedurally incorrect because the parties' stipulation did not address the request and a formal motion should have been presented to the Board, along with the opportunity for the parties to fully brief the issue. DCRC also argues that a stay would violate 7 *Del.C.*

§ 6007(c) by delaying, without the parties' consent, the commencement of a hearing on the Appeal beyond 180 days from the Board's receipt of the Appeal.⁹ DCRC further argues that under the standard set forth in *Lanova* the Environmental Appellants have not met their burden to establish that the "hardship or inequity" they will suffer absent a stay outweighs the harm DCRC will suffer in the event of a stay. DCRC contends it will be harmed during the pendency of a stay from both a business and operational standpoint due to the continued uncertainty of the validity of the Permit authorized under the Order.

B. Findings of Fact and Conclusions of Law

The Board considered the parties' written and oral arguments on the stay request. At the conclusion of arguments by the parties, the Board entered into executive session to deliberate as permitted by 7 *Del.C.* § 6008(a).¹⁰

This Board has discretion as to whether or not to grant a stay and manage its own docket, provided such action is consistent with the *McWane* doctrine as established by the Delaware Supreme Court (and cited by the parties). "The criteria for evaluating a motion to stay were enunciated in *McWane Cast Iron P. Corp v. McDowell-Wellman Engineering Co.* and have been applied consistently by Delaware courts. The question falls squarely within the province of the trial court's discretion and is to be determined in light of all the facts and circumstances and in the interest of expeditious and economic administration of justice. The moving party assumes the burden of showing 'factors of

⁹ 7 *Del.C.* § 6007(c) provides, in part, that "the Board shall conduct, but not necessarily complete, the hearing within 180 days following the receipt of the appeal unless the parties agree otherwise."

¹⁰ 7 *Del.C.* § 6008(a) states, in pertinent part, that "[d]eliberations of the Board may be conducted in executive session."

hardship sufficient to tip the scale in its favor.” *State Dept. of Natural Resources & Environmental Control v. Mike Davidson Enterprises, Inc.*, 2012 WL 6914477 (Del. Super. Nov. 16, 2012) (footnotes and internal citations omitted).

The Board considered the facts and circumstances presented, including the respective hardships of the parties. As the moving parties, the Environmental Appellants have the burden of showing such circumstances and hardships warrant a stay. The Board acknowledges the uniqueness of the circumstances presented here – where two virtually identical appeals have been filed by the Environmental Appellants with both the CZICB and this Board. The Board also acknowledges that with respect to the CZICB Appeal the issues of standing and subject matter jurisdiction are currently on appeal in the Superior Court, as well as the possibility that that Court may conclude that the CZICB does not have jurisdiction.

The Board finds that the facts and circumstances and alleged hardships do not warrant a stay of this Appeal. Although the Environmental Appellants argue that the separate issues of subject matter jurisdiction of the two boards to hear their respective appeals are co-dependent (i.e. resolution of one will necessarily resolve the other), the Board rejects that argument. The Board also rejects the Environmental Appellants’ argument that by staying this Appeal and allowing the Superior Court to address the CZICB’s subject matter jurisdiction, this Board will avoid the possibility of conflicting rulings, and the need for a hearing on the merits before this Board could be rendered moot. It is undisputed that the issue of *this* Board’s jurisdiction is not pending before the Superior Court. And the Environmental Appellants’ contention that the Superior Court

might address this Board's jurisdiction when it rules on the issue of the CZICB's jurisdiction over the CZICB Appeal is speculative. Further, the Environmental Appellants' alleged "inequity" that there is a possibility that neither this Board *nor* the CZICB has subject matter jurisdiction to hear their challenge to the Order is insufficient to stay this Appeal because that possibility exists even if a stay were to be granted by this Board.

Aside from its *McWane* analysis, the Board considered DCRC's argument with respect to 7 *Del.C.* § 6007(c).¹¹ Pursuant to that section, the Board must commence but not necessarily conclude a hearing on an appeal within 180 days of its receipt unless the parties otherwise agree. In this matter, the 180-day period expired on December 11, 2013 and although the parties agreed to an extension beyond that date due to the weather-related rescheduling of the December 10, 2013 hearing, no further agreement was reached. For purposes of this Appeal, however, the Board rejects the argument that § 6007(c) constitutes an additional basis for denial of the stay request.

The Board also considered but did not rely on DCRC's argument that the intentional (or unintentional) omission of any reference to the Environmental Appellants' stay request in the parties' prehearing stipulation. Regardless of whether the parties' stipulation addressed the possibility of (or even the parties' agreement to) the Board's consideration of a stay request, the fact that the stipulation was silent in that regard does not preclude the Board from *sua sponte* considering – and granting – the request.

¹¹ See fn. 9.

Based on the foregoing, and upon careful consideration of the parties' written and oral arguments, the Board unanimously denies the Environmental Appellants' request to stay the Appeal.¹²

**V. DNREC'S AND DCRC'S MOTIONS TO DISMISS FOR
LACK OF SUBJECT MATTER JURISDICTION**

A. Summary of Facts and Arguments

Both DNREC and DCRC contend in their respective motions to dismiss that the Board lacks subject matter jurisdiction under statutory authority and applicable case law to hear the Appeal and that said lack of jurisdiction mandates the Board's dismissal of the Appeal. The Environmental Appellants oppose the motions to dismiss. In addition to briefing, the Board heard oral argument on the motions. The parties' arguments are briefly summarized below.

In support of its motion to dismiss, DNREC make three primary arguments: First, DNREC argues that the statutory scheme of the Environmental Control Act ("Chapter 60")¹³ and specifically 7 *Del.C.* § 6008(a) (from which this Board derives its general jurisdiction powers), do not grant this Board jurisdiction to hear CZA-related issues.¹⁴ DNREC notes that the enactment of the CZA was two years prior to the enactment of the Chapter 60, and the notable absence of any CZA appeal language in § 6008 is a clear

¹² In light of the Board's decision *infra* granting the motions to dismiss for lack of subject matter jurisdiction, the issue raised by DNREC that the Board must first find subject matter jurisdiction before granting or even considering a stay need not be addressed in this decision.

¹³ 7 *Del.C.* § 6001 *et seq.*

¹⁴ 7 *Del.C.* § 6008(a) provides, in part, that "[a]ny person whose interest is substantially affected by any action of the Secretary may appeal to the Environmental Appeals Board within 20 days after receipt of the Secretary's decision or publication of the decision."

indication that the General Assembly did not intend to grant both this Board *and* the CZICB jurisdiction over CZA matters. Further, the term “any action of the Secretary” under § 6008(a) relates to actions under Chapter 60, not the CZA. DNREC argues that where the General Assembly has expanded this Board’s jurisdiction beyond § 6008, it has done so explicitly, such as in § 7210 (regarding appeals of certain subaqueous land permits). Citing *Worldwide Salvage Inc. v. Environmental Appeals Board*, 1986 WL 3650 at *5 (Del. Super. Jan. 30, 1986), DNREC further argues that “a general provision for administrative review by an appropriate appeal board” already explicitly exists for CZA issues. To allow appeals of CZA issues to this Board under § 6008 would create a new right of appeal that is contrary to the statutory provisions under the CZA. To that end, nothing in the CZA expressly states that this Board has jurisdiction to hear issues related to the CZA.

Second, DNREC argues that the Environmental Appellants’ attempt to utilize this Board to hear an appeal of CZA issues undermines the legislative purpose of the CZICB, particularly in light of the fact that the Environmental Appellants view this Board as a fallback position in the event the Superior Court finds that the CZICB does not have jurisdiction. And the Environmental Appellants concede in their statement of appeal that the CZICB is the appropriate forum due to the CZICB members’ expertise in economic development and planning. Additionally, DNREC cites the Delaware Supreme Court’s decision in *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892 (Del. 1994), in support of its argument that § 6008 does not authorize this Board to hear CZA-related appeals because “no party has a right to appeal unless the statute governing the

latter has conferred a right to do so.”¹⁵ To place the review of CZA matters in this Board leads to the unreasonable result of the General Assembly intending a tribunal other than the specialized CZICB to hear CZA appeals.

Lastly, DNREC argues that the question of this Board’s subject matter jurisdiction over CZA issues was addressed by the Delaware Supreme Court in *Oceanport* and mandates dismissal of the Appeal.

In support of its motion to dismiss, DCRC argues the subject matter of the Appeal arises solely from the CZA and does not challenge any aspect of the Order or Permit with respect to Chapter 60. DCRC notes that the Environmental Appellants by their own admission “are challenging only the portions of the Secretary’s Order in which the Secretary ruled on the status of the crude oil transfer operation under the CZA”¹⁶ and filed their CZICB Appeal raising the exact same CZA issues as articulated in their EAB Appeal. DCRC contends that the General Assembly clearly and specifically established the respective jurisdictions of this Board and the CZICB. This Board’s jurisdiction stems directly from, and is expressly limited to, Chapter 60 and other statutes, such as § 7210, but no provision expands the Board’s jurisdiction to hear CZA matters. And the CZA itself contains no provisions conferring jurisdiction upon this Board. Rather, challenges to actions taken by the Secretary are reviewed by the CZICB per 7 *Del.C.* § 7007.

DCRC further argues that *Oceanport* directly supports its position that this Board does not have the jurisdiction to address the EAB Appeal because it (the EAB Appeal) relates solely to issues under the CZA, which does not confer jurisdiction upon this

¹⁵ *Oceanport*, 636 A.2d 892, 900 (Del. 1994)

¹⁶ DCRC’s Op. Br. at 4 (citing Environmental Appellants’ Statement of Appeal at 1).

Board. DCRC argues there are two elements of jurisdiction. First, there must be some action of an administrative agency that falls within the scope of the jurisdictional grant over which the tribunal (i.e. this Board) has jurisdiction. Second, the substance of the challenge likewise must fall within that scope. DCRC contends both must be present; however, as in *Oceanport*, although the issuance of the Permit was an “action of the Secretary” under Chapter 60, the subject matter underlying the Environmental Appellants’ challenge of the Permit (i.e. an alleged violation of the CZA) does not fall within the substantive issues governed by the Chapter 60 and therefore this Board has no authority to hear the EAB Appeal.

In opposition to the motions to dismiss, the Environmental Appellants make several arguments in support of their position that this Board has subject matter jurisdiction to hear the EAB Appeal. First, the Environmental Appellants contend that the EAB Appeal falls squarely under this Board’s jurisdiction because the issuance of the Permit – an amended air pollution control permit – constitutes an “action of the Secretary” under § 6008(a) and, moreover, is a permit issued under Chapter 60. They contend that this Board always hears appeals of this type of permit.

The Environmental Appellants also argue that the Secretary’s consideration of CZA issues were part of the review process for the Permit. They cite to 7 *Del. Admin. C.* 1102, § 11.6 as requiring, prior to DRNEC’s issuance of a permit, the applicant to “show[] to the satisfaction of [DNREC] that the . . . air pollution control device is designed to operate...without causing a violation of . . . any rule or regulation of [DNREC]”. In essence the Environmental Appellants argue that the existence of a “CZA issue” is

irrelevant to this Board's jurisdiction, rather it is the failure to the Secretary to ensure compliance with Regulation 11.6 with respect to consideration of the CZA issues that confers jurisdiction on this Board.

The Environmental Appellants further argue that the phrase "any action of the Secretary" in § 6008(a) contains no qualifiers and is broad enough to include anything the Secretary can do, not just actions taken under Chapter 60 as argued by DNREC. The Environmental Appellants dispute DNREC's and DCRC's reliance on *Worldwide Salvage*, and argue that by enacting 7 Del.C. § 6008(e)¹⁷ the General Assembly expressly excluded from this Board's jurisdiction appeals from Secretary's decisions regarding state-owned land (including subaqueous lands). They contend that the General Assembly could have made the same type of exclusion within § 6008 for CZA issues – but did not. Thus, the General Assembly intended no further limitations on this Board's jurisdiction under § 6008 over appeals from "any action of the Secretary."

Further, the Environmental Appellants disagree with DNREC's and DCRC's contention that *Oceanport* warrants dismissal of the EAB Appeal on subject matter jurisdiction grounds and contend that the Delaware Supreme Court made no mention of (or decision with respect to) this Board's jurisdiction. The Environmental Appellants

¹⁷ 7 Del.C. § 6008(e) provides that "[t]here shall be no appeal of a decision by the Secretary to deny a permit on any matter involving state-owned land including subaqueous lands, except an appeal shall lie on the sole ground that the decision was discriminatory in that the applicant, whose circumstances are like and similar to those of other applicants, was not afforded like and similar treatment." As noted by the Environmental Appellants, the current language of this section varies slightly from the version in effect at the time *Worldwide Salvage* was decided in 1986. The version of § 6008(e) in effect at that time read as follows: "There shall be no appeal of a decision by the Secretary to deny a permit on any matter involving State-owned land including subaqueous lands."

argue the case was decided solely on standing grounds and cite a footnote where the *Oceanport* Court states that the dismissal “renders moot the question of whether WSI erroneously appealed to the [EAB] rather than the Coastal Zone Industrial Control Board.”¹⁸ The Environmental Appellants also argue that DNREC’s and DCRC’s reliance on *Oceanport* leads to the unacceptable result where there is no forum in which to raise their concerns regarding the Order.

B. Findings of Fact and Conclusions of Law

The Board considered the parties’ written and oral arguments on the motions to dismiss. At the conclusion of arguments by the parties, the Board entered into executive session to deliberate as permitted by 7 *Del.C.* § 6008(a).¹⁹

Establishing subject matter jurisdiction is the threshold requirement in any appeal brought before this Board because absent such jurisdiction being conferred on this Board by an act of the General Assembly, or by a Delaware court interpreting an act of the General Assembly, the Board is powerless to take further action regarding an appeal.²⁰ Generally, the party or parties bringing an action – here the Environmental Appellants – have the burden of establishing the tribunal’s – here this Board’s – subject matter jurisdiction to hear the matter.

Our analysis starts with the Statement of Appeal to determine whether the Environmental Appellants meet their burden to establish the Board’s subject matter jurisdiction to hear the Appeal. The Environmental Appellants’ expressly state that they

¹⁸ Appellants’ Ans. Br. at 16.

¹⁹ See fn. 10.

²⁰ See fn. 12.

“are challenging only the portion of the Order in which the Secretary ruled on the status of the crude oil transfer operation *under the Coastal Zone Act.*”²¹ (Emphasis added). They “believe that the *CZICB is the appropriate forum to determine the applicability of the CZA to a particular activity*, and intend to argue for such before the CZICB and [the EAB.]”²² (Emphasis added). While acknowledging their uncertainty as to which administrative appeals board – the CZICB or the EAB – has subject matter jurisdiction over their challenge, and explaining their reasons for filing with both boards, the Environmental Appellants nonetheless couch the EAB Appeal as one brought under the CZA, not Chapter 60.²³ In fact, in their Statement of Appeal all of the reasons stated as to why the Order is improper cite specific statutory provisions under the CZA.²⁴ These include the assertions that DCRC’s crude oil transfer operation is a “bulk product transfer facility” prohibited by 7 *Del.C.* § 7003; the crude oil operation is not a nonconforming use under the CZA; and that, if the crude oil operations or the refinery itself is a nonconforming use under the CZA, then a CZA permit is required under 7 *Del.C.* § 7004(a) because the operation is an expansion or extension of that nonconforming use.²⁵

The Board concludes that the Statement of Appeal by its express terms, and by extension the EAB Appeal, pertains solely to matters arising under the CZA. The only statements or references in the Statement of Appeal that even hint at this Board’s

²¹ Environmental Appellants’ Statement of Appeal at 1.

²² *Id.*

²³ *Id.* at 3 – 7.

²⁴ *Id.*

²⁵ *Id.*

jurisdiction are that the Order is a “final action of the Secretary” under § 6008(a), and *not* an order on an application for a CZA status decision or CZA permit.²⁶ However, no aspect of permitting requirements under Chapter 60, or conditions of the Permit itself, such as the emissions limitations or monitoring requirement, are being challenged in the Appeal. The Environmental Appellants’ reference to the Secretary’s failure to comply with Regulation 11.6, a regulation promulgated under the Chapter 60, as the basis for their contention that the Permit issuance was improper is not persuasive because the “rule or regulation” allegedly violated is the CZA or the CZA regulations.

Despite the exclusivity of CZA issues in their Statement of Appeal, the Environmental Appellants nevertheless contend the Secretary’s ruling in the Order as to applicability of the CZA to DCRC’s propose use under the Permit constitutes an “action of the Secretary” under 7 *Del.C.* § 6008(a) and thus falls within the jurisdiction of this Board. For reasons stated more fully below, we reject that argument on two grounds.

First, we rely on statutory authority, specifically 7 *Del.C.* § 6008(a).²⁷ This Board does not have general subject matter jurisdiction over *any* and *all* challenges to – and appeals of – DNREC’s actions or those of DNREC’s Secretary. The Board’s jurisdiction is limited and conferred by § 6008(a), as well as several other Title 7 statutory provisions outside of Chapter 60 conferring original and appellate jurisdiction on the Board. Under § 6008(a), however, the Board’s jurisdiction is expressly limited to appeals involving “any action of the Secretary.” Beyond that section there are no statutory provisions in

²⁶ *Id.* at 1.

²⁷ *See* fn. 13.

Chapter 60 or the CZA, or anywhere else in Title 7, addressing this Board's authority to assume jurisdiction over the Appeal.

We reject the Environmental Appellants' argument that because § 6008(a) contains no qualifying language the phrase "any action of the Secretary" encompasses and includes *any* actions (i.e. decisions) of the Secretary. We find that no qualifying language is necessary because the Board is created under – and derives its jurisdictional authority from – Chapter 60 and the phrase is therefore limited to actions arising thereunder. It is undisputed that the EAB Appeal is a challenge to an amended air pollution control permit issued under Chapter 60; however, the basis of the challenge is exclusively under the CZA and does not arise under Chapter 60. The Board declines to accept the Environmental Appellants' expansive view and application of § 6008(a) simply because the Permit was issued under Chapter 60. To do so would effectively confer jurisdiction over CZA matters on this Board, something the General Assembly has not done by statutory enactment. And where the General Assembly has conferred jurisdiction to the Board beyond Chapter 60, it has done so explicitly.²⁸ To adopt such a broad interpretation of § 6008(a) and conclude its scope goes beyond Chapter 60 to *any* action of the Secretary would be treating all other provisions that confer jurisdiction on

²⁸ See e.g. 7 Del.C. § 4123 (with respect to appeals of Secretary's decisions involving operation, maintenance and inspection of dams); 7 Del.C. § 7210 (with respect to appeals involving subaqueous lands); 7 Del.C. § 7412 (with respect to appeals of Secretary's decisions involving underground storage tanks); 7 Del.C. § 7411A (with respect to appeals involving aboveground storage tanks); 7 Del.C. § 7904(4) (with respect to original determination of chronic violator status); and 7 Del.C. § 9117 (with respect to appeals involving the imposition of a liens related to hazardous substance cleanup).

the Board as surplusage (i.e., redundant and unnecessary). Basic tenets of statutory construction instruct us to reject that approach.²⁹

In addition, the “any action of the Secretary” language in § 6008(a) has remained unchanged since its enactment as part of a complete rewrite of Chapter 60 (and the Board’s creation) in 1973³⁰, two years *after* the enactment of the CZA.³¹ It is telling that the General Assembly when enacting Chapter 60 chose not to include CZA matters within the Board’s jurisdiction, and has not chosen to do so in any statutory enactment in the past 41 years. It is also telling that at the time § 6008(a) was originally enacted the Secretary had no authority, regulatory or otherwise, over the CZA and did not assume that role until 1981.³²

The Board also rejects the Environmental Appellants’ argument that the General Assembly impliedly conferred jurisdiction on this Board for CZA matters by not expressly *excluding* that jurisdiction in Chapter 60, as it has done in § 6008(e) for appeals of state-owned subaqueous lands. In our view, the prior enactment of the CZA, which included the creation of the specialized CZICB to hear appeals from decisions of the Secretary on CZA matters, makes it clear that the General Assembly did not intend for this Board to assume jurisdiction over CZA matters absent an express legislative directive. Had the General Assembly intended to extend CZA jurisdiction to this Board in any context, we believe that § 6008(a), or perhaps some other statutory section, would

²⁹ See *Clark v. State*, 65 A.3d 571, 577 (Del. 2013) (“We presume that the General Assembly intentionally chose particular language and therefore construe statutes to avoid surplusage if reasonably possible.”)

³⁰ 59 Del. Laws, c. 212, § 1

³¹ 58 Del. Laws, c. 175

³² 63 Del. Laws, c. 191

state so explicitly. To that end, no provision within Chapter 60 or elsewhere in Title 7 confers subject matter jurisdiction over CZA matters to this Board, and the Environmental Appellants cannot point to any. Jurisdiction regarding appeals of CZA issues is set forth exclusively in 7 *Del.C.* § 7006, and does not fall on this Board concurrently, or by default if jurisdiction is not found there.

The Board concludes that the phrase “any action of the Secretary” in § 6008(a) does not include any actions or decisions made by the Secretary regarding any aspect of the CZA. Here, the EAB Appeal challenges the Order only with respect CZA issues and this Board has no role in that challenge.

Second, we rely on applicable case law. The Board finds that the Delaware Supreme Court addressed the question of this Board’s subject matter jurisdiction over CZA matters in *Oceanport*, which is applicable legal precedent that this Board is bound to follow. The Board rejects the Environmental Appellants’ argument that the Court’s holding in *Oceanport* was solely on standing grounds and does not support dismissal of this Appeal on jurisdictional grounds.

In our 1991 decision that was eventually appealed to the Delaware Supreme Court in *Oceanport*, we held the Board did not have subject matter jurisdiction to hear CZA matters raised by appellants who were challenging the Secretary’s issuance of two environmental (Chapter 60) permits and a subaqueous lands (Chapter 72) permit several years after the Secretary’s CZA determination regarding the subject facility.³³ On appeal,

³³ See *Oceanport*, 636 A.2d 892, 899 (“[t]he EAB stated that ‘the entire thrust of the WSI complaint clearly indicates that the complaint belongs before the [CZICB] and not the [EAB]’”).

the Superior Court acknowledged the split of appellate authority between the EAB and the CZICB³⁴ but nevertheless remanded the matter back to the EAB with instructions to further remand the matter back to the Secretary to make a determination regarding compliance with the CZA. On further appeal, the Supreme Court determined that the Superior Court's decision to remand was erroneous because there was no requirement for "concurrent compliance" with the CZA when issuing Chapter 60 permits, and it is the CZICB, not the EAB, that handles appeals related to the CZA, given the statutory scheme of Chapter 60 and the CZA.³⁵

The Board finds the *Oceanport* Court's rationale is binding and determinative with respect to the Board's jurisdictional limitations over this Appeal. The specific relief sought by the Environmental Appellants is that the Order "should be *reversed* or *remanded* with instructions to DNREC to comply with the Coastal Zone Act and its implementing regulations."³⁶ (Emphasis added). A remand is exactly the relief obtained by the *Oceanport* appellants in the Superior Court that the Delaware Supreme Court viewed as improper given that "the [CZICB] handles appeals from decisions of the Secretary" under the CZA. *Oceanport* instructs us that a remand from this Board to the Secretary to make a determination as to CZA applicability to a Chapter 60 permit is legally improper. And logically it follows that if this Board cannot even remand the case

³⁴ *Id.* at n. 6 ("As the Superior Court discussed in its decision: The Board's problem arose because there is a split of appellate authority; appeals from decision of the Secretary [of the DNREC] regarding the Coastal Zone Act are directed to one Board, the Coastal Zone Industrial Control Board, and appeals from decisions of the Secretary regarding permits of the type at issue here are directed to a different Board, the Environmental Appeals Board.")

³⁵ *Id.* at 907.

³⁶ Environmental Appellants' Statement of Appeal at 7.

to the Secretary due to its jurisdictional limitations then it certainly cannot hear the case on its merits to make the determination itself.³⁷

In conclusion, until the General Assembly makes a statutory enactment regarding this Board's jurisdiction over CZA issues, or a Delaware court interprets § 6008(a) as conferring such jurisdiction on this Board, we believe that the statutory scheme of Chapter 60, § 6008 in particular, as well as the judicial directive in *Oceanport*, clearly address the boundaries of this Board's jurisdiction with respect to the review of matters arising out of the CZA. Simply put, the EAB Appeal is outside of those boundaries.

Based on the foregoing, and upon careful consideration of the parties' written and oral arguments, the Board concludes, unanimously, that the Environmental Appellants have not met their burden to establish this Board's subject matter jurisdiction to hear the EAB Appeal and accordingly grants DNREC's and DCRC's respective motions to dismiss.^{38, 39}

³⁷ *Oceanport*, 636 A.2d 892, 899 n.6 ("Quite naturally the Environmental Appeals Board considers it beyond the scope of its authority to review the CZA determination.").

³⁸ As a practical matter, the granting of the motions to dismiss effectively renders the Environmental Appellants' stay request moot.

³⁹ Of course, this Board's ruling with respect to its own jurisdiction has no bearing whatsoever on the issue currently pending in the Superior Court as to whether the CZICB has jurisdiction over the CZICB Appeal. To that end, the Board takes no position on the Environmental Appellants' argument that one of the two boards *must* have jurisdiction in order for their challenge to be heard on its merits – other than the position that this Board does not.

IT IS SO ORDERED, this 8th day of April, 2014.

ENVIRONMENTAL APPEALS BOARD

The following Board members concur in this decision.

Date: April 4, 2014

Nancy J. Shevock
Nancy J. Shevock
Chairperson

Date: _____

Sebastian LaRocca
Board Member

Date: _____

Gordon E. Wood, Sr.
Board Member

Date: _____

Andrew J. Aerenson, Esquire
Board Member

Date: _____

Michael Horsey
Board Member

Date: _____

Dean Holden
Board Member

*Environmental Appeals Board
Appeal No. 2013-06*

IT IS SO ORDERED, this 8th day of April, 2014.

ENVIRONMENTAL APPEALS BOARD

The following Board members concur in this decision.

Date: _____

Nancy J. Shevock
Chairperson

Date: APR. 7, 2014

Sebastian A. LaRocca
Sebastian LaRocca
Board Member

Date: _____

Gordon E. Wood, Sr.
Board Member

Date: _____

Andrew J. Aerenson, Esquire
Board Member

Date: _____

Michael Horsey
Board Member

Date: _____

Dean Holden
Board Member

Environmental Appeals Board
Appeal No. 2013-06

IT IS SO ORDERED, this 8th, day of April, 2014.

ENVIRONMENTAL APPEALS BOARD

The following Board members concur in this decision.

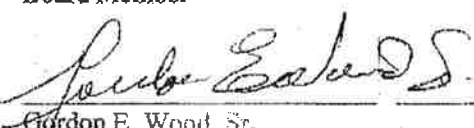
Date: _____

Nancy J. Shevock
Chairperson

Date: _____

Sebastian LaRocca
Board Member

Date: 4/7/14


Gordon E. Wood, Sr.
Board Member

Date: _____

Andrew J. Aerenson, Esquire
Board Member

Date: _____

Michael Horsey
Board Member

Date: _____

Dean Holden
Board Member

IT IS SO ORDERED, this 8th day of April, 2014.

ENVIRONMENTAL APPEALS BOARD

The following Board members concur in this decision.

Date: _____

Nancy J. Shevock
Chairperson

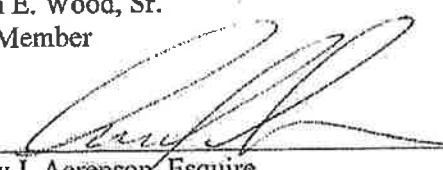
Date: _____

Sebastian LaRocca
Board Member

Date: _____

Gordon E. Wood, Sr.
Board Member

Date: 4/7/14



Andrew J. Aerenson, Esquire
Board Member

Date: _____

Michael Horsey
Board Member

Date: _____

Dean Holden
Board Member

IT IS SO ORDERED, this 8th day of April, 2014.

ENVIRONMENTAL APPEALS BOARD

The following Board members concur in this decision.

Date: _____

Nancy J. Shevock
Chairperson

Date: _____

Sebastian LaRocca
Board Member

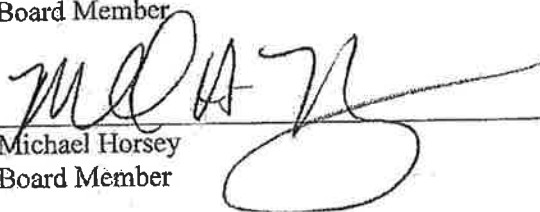
Date: _____

Gordon E. Wood, Sr.
Board Member

Date: _____

Andrew J. Aerenson, Esquire
Board Member

Date: 4/8/14



Michael Horsey
Board Member

Date: _____

Dean Holden
Board Member

IT IS SO ORDERED, this 8th day of April, 2014.

ENVIRONMENTAL APPEALS BOARD

The following Board members concur in this decision.

Date: _____

Nancy J. Shevock
Chairperson

Date: _____

Sebastian LaRocca
Board Member

Date: _____

Gordon E. Wood, Sr.
Board Member


Date: _____

Andrew J. Aerenson, Esquire
Board Member

Date: _____

Michael Horsey
Board Member

Date: 04/07/2014



Dean Holden
Board Member

